

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2408

Cir. Ct. No. 2016CV525

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARGARET AHNE HERLITZKA,

PETITIONER-RESPONDENT,

V.

JOHN ALLAN ZERNIA,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
LYNN M. RIDER, Judge. *Affirmed.*

Before Sherman, Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Allan Zernia appeals a harassment injunction issued to Margaret Ahne Herlitzka. Zernia argues that the evidence did not support the injunction. For the reasons set forth below, we conclude that the circuit court properly exercised its discretion to grant the injunction. We affirm.

¶2 On October 13, 2016, Herlitzka petitioned for a harassment injunction against Zernia. The petition asserted that Zernia had harassed Herlitzka by: (1) arriving at Herlitzka's home unannounced and telling Herlitzka's husband that Herlitzka was driving a wedge between Zernia and his son and that Herlitzka should not be a practicing Catholic if she practiced divorce law; and (2) placing a flyer containing negative allegations about Herlitzka on 110 cars at a Catholic school function.

¶3 The court held an injunction hearing on October 21, 2016. Herlitzka and Zernia both testified, and their testimony was consistent as to the following. Zernia and Herlitzka knew each other because their sons had been friends for many years. Zernia went through a divorce that was finalized in August 2011, and Herlitzka was a member of the law firm that represented Zernia's wife in the divorce. In April 2016, Zernia went to Herlitzka's residence to speak to her about her involvement in the child custody component of the Zernia divorce and issues that Zernia was experiencing with his son. Herlitzka was not home, so Zernia spoke to Herlitzka's husband. Zernia informed Herlitzka's husband that Zernia believed Herlitzka had not acted according to Catholic standards during her involvement in the Zernia divorce, and that Zernia did not want his son going to the Herlitzka home any longer. In October 2016, Zernia distributed 110 copies of a flyer on cars at a Catholic school event making negative allegations about Herlitzka, including that Herlitzka had engaged in non-Catholic behaviors as one of Zernia's ex-wife's divorce lawyers, that anyone who knew the Herlitzkas

should be careful, and that those who were family friends of the Herlitzkas should be very careful.

¶4 At the conclusion of the hearing, Herlitzka argued that Zernia engaged in 110 separate acts of harassing Herlitzka by distributing the flyers with disparaging allegations about Herlitzka at the school, and also harassed Herlitzka by his actions at the Herlitzka residence. Zernia argued that his actions were not intended to harm Herlitzka but, instead, were motivated by his religious beliefs and concerns as a parent, and served a legitimate purpose of expressing his beliefs about immorality and violations of Catholic Church doctrines. He argued that his placing the fliers on the cars at the school event was a single act, which alone would not constitute a course of conduct.

¶5 The court found that Zernia acted with intent to harass Herlitzka. The court found that Zernia went to Herlitzka's home because he irrationally blamed her for the pain he was experiencing from the divorce and his son's problems, not as a concerned parent to express that he did not want his son to be at that house anymore. The court found that Zernia's distribution of the disparaging flyer on the cars at the school was intended to harm Herlitzka, and that there was no legitimate purpose to distributing harmful allegations about Herlitzka to people at a school event. The court therefore granted Herlitzka a harassment injunction against Zernia. Zernia appeals.

¶6 A circuit court may grant a harassment injunction if the court "finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." WIS. STAT. § 813.125(4)(a)3. (2015-

16).¹ “Harassment” includes “[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.” Sec. 813.125(1)(am)2. Whether to grant an injunction is within the circuit court’s discretion. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. We will uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.* Whether those findings meet the legal standard for issuing an injunction is a question of law that we decide independently. *Id.*

¶7 Zernia contends that the circuit court did not have reasonable grounds to believe that Zernia had engaged in harassment with intent to harass Herlitzka. He argues that he did not intend to harass Herlitzka, pointing to his testimony that he went to the Herlitzka residence with the intent to express his concerns as a parent and that he distributed the flyers out of his religious convictions. Zernia also argues that his actions did not constitute a “course of conduct” because, according to Zernia, the visit to the Herlitzka residence and the distribution of the flyers were single isolated acts. *See Bachowski v. Salamone*, 139 Wis. 2d 397, 407-08, 407 N.W.2d 533 (1987) (holding that “single isolated acts do not constitute ‘harassment’ under [WIS. STAT. § 813.125(1)(b)]”). Zernia further contends that his desire to express his concerns as a parent, and to express his religious beliefs, provided legitimate purposes for his actions. *See Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶43, 355 Wis. 2d 800, 850 N.W.2d 112 (recognizing constitutional freedom of speech concerns implicated by restrictions

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

on public expressions); *Welytok*, 312 Wis. 2d 435, ¶30 (conduct that serves a legitimate purpose is not harassment). We disagree.

¶8 We reject Zernia’s contention that he lacked the requisite intent to harass. The court found that Zernia acted with the intent to harass Herlitzka, and we have no basis to disturb that factual finding. *See id.*, ¶26 (explaining that a party’s intent is a question of fact). The circuit court was entitled to infer from the evidence of Herlitzka’s involvement in the Zernia divorce, the disparaging statements Zernia made to Herlitzka’s husband at the Herlitzka residence, and the disparaging content of the flyer that Zernia intended to harm Herlitzka when he visited the Herlitzka home and then distributed the flyer on cars at the school event. *See id.*, ¶¶26, 35 (explaining that “[i]ntent is a fact that must be inferred from the acts and statements of the person, in view of the surrounding circumstances” and that “harass” means “to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger” (quoted sources and internal quotation marks omitted))).

¶9 We also reject Zernia’s contention that his acts did not constitute a course of conduct. First, the circuit court found that Zernia’s acts at the Herlitzka residence and at the school were both based on Zernia’s anger at Herlitzka related to the Zernia divorce and were intended to harm Herlitzka. *See id.*, ¶25 (explaining that a “course of conduct” is a “pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose” (quoted source omitted))). We are not persuaded by Zernia’s assertion that the acts were isolated based on being separated by a period of six months. Moreover, we disagree with Zernia’s assertion that the distribution of the flyers amounted to a single incident. Rather, we agree with Herlitzka that each act by

Zernia of placing a flyer on a car at the school event constituted its own act, and that those acts amounted to a course of conduct. *See id.*

¶10 Finally, we disagree with Zernia’s contention that his acts served a legitimate purpose. The circuit court found that Zernia did not go to the Herlitzka’s residence to express his concerns as a parent and that his placing flyers on cars at the school did not serve any legitimate purpose. Zernia’s assertion of his constitutional rights to freedom of speech and religion does not immunize his conduct that was harassing in nature. *See Board of Regents*, 355 Wis. 2d 800, ¶45 (holding that constitutional right to freedom of speech is not absolute, and may be restricted when conduct is harassing). The court considered Zernia’s argument that his conduct served a legitimate purpose and found that, taking into account all of the facts and circumstances, the acts were done with intent to harass rather than for any legitimate purpose. “[W]hether conduct serves a legitimate purpose is a determination that must of necessity be left to the fact finder, taking into account all the facts and circumstances.” *Welytok*, 312 Wis. 2d 435, ¶30 (quoting *Bachowski*, 139 Wis. 2d at 408). The evidence at the hearing, including the disparaging statements Zernia made to Herlitzka’s husband and the content of the flyer, supports the circuit court’s finding. We have no basis to disturb that finding.

¶11 The circuit court found, based on the evidence at the hearing, that Zernia harassed Herlitzka with the intent to harass her. The court therefore properly exercised its discretion to grant the injunction. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

